

Nguyen (Migration) [2018] AATA 1544 (21 May 2018)

DECISION RECORD

DIVISION:	Migration & Refugee Division
REVIEW APPLICANT:	Ms NGUYEN Thuy Duong
VISA APPLICANT:	Mr TRAN Phi Viet
CASE NUMBER:	1613336
DIBP REFERENCE(S):	OSF2015/071495
MEMBER:	Shane Lucas
DATE:	21 May 2018
PLACE OF DECISION:	Melbourne
DECISION:	The Tribunal remits the application for a Prospective Marriage (Temporary) (Class TO) visa for reconsideration, with the direction that the visa applicant meets the following criteria for a Subclass 300 (Prospective Marriage) visa: • cls.300.215 and 300.216 of Schedule 2 to the Regulations; and • cl.300.221 of Schedule 2 to the Regulations.

Statement made on 21 May 2018 at 4:39pm

CATCHWORDS

Migration – Prospective Marriage (Temporary) (Class TO) – Subclass 300 (Prospective Marriage) visa – Genuine intention to marry – Cultural wedding ceremony in Vietnam – Notice of Intended Marriage form provided – No major financial commitments together – Parties living in different countries – Couple undertake and plan joint social activities when together – No impediment to the proposed marriage – Credible oral evidence – Decision under review remitted for reconsideration

LEGISLATION

Migration Act 1958, ss 5F, 65

Migration Regulations 1994, r 1.15A Schedule 2 cls 300.211, 300.212, 300.212A, 300.213, 300.214, 300.215, 300.216, 300.221

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

1. This is an application for review of a decision made by a delegate of the Minister for Immigration on 29 June 2016 to refuse to grant the visa applicant a Prospective Marriage (Temporary) (Class TO) visa under s.65 of the *Migration Act 1958* (the Act).
2. The visa applicant is a Vietnamese national born on 19 January 1986. He applied for the visa on 25 June 2015 on the basis of his relationship with the review applicant. At the time the visa application was lodged, Class TO contained only one subclass: Subclass 300 (Prospective Marriage). The criteria for a Subclass 300 visa are set out in Part 300 of Schedule 2 to the Migration Regulations 1994 (the Regulations). The primary criteria must be satisfied by at least one applicant. Relevant to this matter, the primary criteria include cls.300.215, 300.216, and 300.221.
3. The delegate refused to grant the visa on the basis that the visa applicant did not satisfy cls.300.215 and 300.216 - and therefore cl.300.221 - of Schedule 2 to the Regulations because the parties were unable to provide evidence or information which allowed the delegate to reasonably establish that they have a genuine intention to marry; that the marriage is going to take place within the visa period; and that the parties genuinely intend to live together as spouses.
4. The review applicant seeks review of the delegate's decision.
5. The review applicant appeared before the Tribunal on 9 May 2018 to give evidence and present arguments. The Tribunal also received oral evidence from the visa applicant.
6. The applicants were represented in relation to the review by a registered migration agent.
7. For the following reasons, the Tribunal has concluded that the matter should be remitted for reconsideration.

CONSIDERATION OF CLAIMS AND EVIDENCE

8. The issues in the present case are whether at the time of application the visa applicant intended to marry an eligible person for the purposes of the Act (cl.300.211); whether the visa applicant has established that the parties genuinely intend to marry (cl.300.215(a)); that the marriage is intended by the parties to take place within the visa period (cl.300.215(b)); that the Minister is satisfied that the parties genuinely intend to live together as spouses (cl.300.216); and whether at the time of decision, the visa applicant continues to satisfy the criteria (cl.300.221).

Does the visa applicant intend to marry an eligible person?

9. Clause 300.211 requires that at the time of application the visa applicant intends to marry a person who is an Australian citizen or Australian permanent resident or an eligible New Zealand citizen. In the present case, the visa applicant claims to intend to marry the review applicant. The parties provided documentation attesting that the review applicant (born in Bac Lieu, Vietnam on 9 August 1975) became an Australian permanent resident on 30 October 1994. Accordingly, the requirements of cl.300.211 are met.

Other relevant criteria

10. The Tribunal is satisfied that cls.300.212, 300.212A, 300.213 and 300.214 are met.

Do the parties genuinely intend to marry?

11. Clause 300.215 requires that at the time of application the parties have a genuine intention to marry and that the marriage is intended to take place within the visa period. The parties have supplied documentation and photographic evidence attesting to the holding of a cultural wedding ceremony in Vietnam on 13 December 2014. The review applicant confirmed that the parties have not registered or formalised their marriage with the Vietnamese, Australian or any other relevant authorities such as would be required to consider the marriage to be valid for the purposes of the Act. The parties have provided a Notice of Intended Marriage (dated 22 April 2015) authorised by a civil marriage celebrant stating that they intend to marry "as soon as the [visa applicant] comes to Australia". On the evidence before it, the Tribunal is therefore satisfied that the requirements of cl.300.215 are met.

Do the parties genuinely intend to live together?

12. Clause 300.216 requires that at the time of application 'the parties genuinely intend to live together as spouses'. 'Spouse' is defined in s.5F of the Act and provides that a person is the spouse of another where those two people are in a married relationship. Persons in a married relationship must be married to each other under a marriage that is recognised as valid for the purposes of the Act; there must be a mutual commitment to a shared life as a married couple to the exclusion of all others; the relationship must be genuine and continuing; and the couple must live together, or not live separately and apart on a permanent basis: s.5F(2)(a)-(d).
13. In considering an application for a Prospective Marriage (Temporary) (Class TO) visa, the Tribunal may have regard to the considerations set out in r.1.15A(3) for spousal relationships: r.1.15A(4). While it is not appropriate to consider whether the parties are spouses at the time of application or time of decision, an investigation of the parties' intentions with regard to the definition of spouse in legislation may assist in determining the parties' aspirations.
14. Having regard to these considerations and the degree to which these factors may be applied to determine a future intention, the Tribunal makes the following findings:

15. Financial aspects of the relationship

16. The Tribunal was provided with documentation and received oral evidence regarding the financial aspects of the relationship between the parties. The Tribunal received documentation regarding two money transfers from the review applicant to the visa applicant totalling some AUD 492 in March-April 2015. In oral evidence, the review applicant stated that these transfers were intended as gifts, as the visa applicant works regularly as a courier and taxi driver and does not seek or require her financial support. The review applicant stated that she receives a parenting payment and Newstart allowance from the Australian Government, and that on her frequent visits to Vietnam, the visa applicant pays for the majority of their expenses (and her travel costs) as she does not have the financial means to do so. The parties do not claim to have a joint bank account and with the exception of the money transfers and limited sharing of day-to-day expenses noted above, the parties do not claim to have pooled their financial resources.

17. On consideration of the evidence, the Tribunal finds that the parties have each made some financial contribution toward their shared day-to-day expenses during the review applicant's frequent visits to Vietnam; however the Tribunal found no evidence that the parties have pooled their financial resources in any meaningful way or in relation to major financial commitments. Moreover, the Tribunal found no evidence that the parties have acquired joint ownership of real estate or other major assets; or that the parties have any joint liabilities.
18. Given the constraints of residing in separate countries, the Tribunal gives the financial aspects of the couple's relationship little weight in determining the parties' genuine intention to marry and live together as spouses.
19. **Nature of the household**
20. The Tribunal was provided with documentation and received oral evidence regarding the nature of the couple's household. Since first meeting in November 2013 and conducting a cultural wedding ceremony on 13 December 2014, the couple have lived together in Vietnam on several occasions for a period totalling some 50 weeks, being December 2014-February 2015 (nine weeks); May 2015 (two weeks); July-August 2015 (three weeks); October-December 2015 (seven weeks); January-March 2016 (six weeks); July-August 2016 (three weeks); October-November 2016 (two weeks); December 2016-February 2017 (seven weeks); April 2017-May 2017 (two weeks); August-September 2017 (three weeks); October 2017 (two weeks); and January-February 2018 (four weeks). The Tribunal also received extensive and detailed records of the couple's ongoing communication via telephone and SMS using the Viber online platform during the many periods of separation over the course of their relationship.
21. In oral evidence, the review applicant stated that the couple have predominantly lived together in a rented property in the review applicant's home province of Bac Lieu. The review applicant stated that the house is near her own family home, and that the review applicant maintains a lease on the property for the periods that she is able to return to Vietnam. The review applicant also provided documentation in the form of a certified copy and accompanying translation of a certification from the Chief of Police, Ho Phong Ward, Gia Rai City in Bac Lieu stating that the visa applicant has also resided at his sister-in-law's house in Bac Lieu from time to time since November 2015.
22. The review applicant stated that her two children travelled with her to Vietnam at the time of the couple's cultural wedding ceremony in December 2014, but that on subsequent visits to her home country, the review applicant's children have remained in Melbourne with her Australian-resident sister so as not to interfere with their schooling. In oral evidence, the review applicant also stated that the couple share housework at the rental house when she is in Vietnam, but that they take the majority of their meals at the home of her father.
23. On the basis of the evidence, the Tribunal finds that the couple has resided together for almost one year over the course of twelve separate periods since they committed to each other in a cultural ceremony in December 2014. The Tribunal found some evidence of the living arrangements of the couple during their time together, and some evidence of the sharing of responsibility for housework. The Tribunal found no evidence of joint responsibility for the care and support of children.
24. Given the constraints of residing in separate countries, the Tribunal gives certain aspects of the nature of the couple's household little weight in determining the parties' genuine intention to marry and live together as spouses. However, the Tribunal gives significant weight to the evidence attesting to the couple's efforts to establish a household during the course of the review applicant's many visits to Vietnam over the period of their relationship, in seeking to determine the parties' genuine intention to marry and live together as spouses.

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27. Social aspects of the relationship

28. The Tribunal received documentation, Statutory Declarations, and oral and photographic evidence attesting to the social aspects of the relationship between the parties.

29. The applicants' provided a substantial body of photographic evidence relating to the review applicant's several visits to Vietnam from the time of their cultural wedding ceremony in December 2014, and the most recent time the review applicant spent in her country of origin in January-February 2018. These photographs cover a broad spectrum from formal portraits of the couple at their cultural wedding ceremony on 13 December 2014; and casual photographs of the couple together and/or in the company of others in various social and recreational settings including tourist destinations, restaurants and family homes.

30. The Tribunal also received frank and credible oral evidence from the review applicant regarding the initial difficulties she experienced with regard to the acceptance of the relationship by her family, especially her elderly father. The review applicant stated that her father was initially concerned about the age difference between the couple (the review applicant is some ten years older than the visa applicant) and worried that his daughter – who had an earlier failed marriage – might again have a bad relationship experience. The review applicant's father provided a written statement to the Tribunal (dated 8 March 2018) acknowledging his initial reservations about the relationship, and reflecting on how his opinion of the relationship has changed over time:

31. *"In 2013, my daughter [the review applicant] went back to Vietnam to pay a visit and she got to know a new friend named [the visa applicant]. She took him home and introduced him to me... After that, my daughter returned to Australia and then came back to Vietnam again. They decided to get married but I did not accept it because my daughter had been married and broken up before. Moreover, I noticed that my daughter was older than [the visa applicant]. They held their wedding ceremony in Vinh Long themselves. They mentioned it to me but I did not attend because of my illness. After they got married, they lived together near my house in Bac Lieu. I noticed that they really loved each other. After my daughter returned to Australia, [the visa applicant] continued to live here and he often came to visit my family. As time went by, I realised that he was good and I accepted him as my son-in-law... After that, my family also came to visit [the visa applicant's] family. Both of our families are happy with this marriage."*

32. On the basis of the evidence, the Tribunal finds that the persons represent themselves to others as being in a genuine and continuing relationship, and that the relationship is genuine and continuing in the opinion of their friends, family members and acquaintances. Within the constraints of living in separate countries, the Tribunal also finds that the couple undertake and plan joint social activities on the many occasions that the couple have resided together in Vietnam.

33. The Tribunal is satisfied that the social aspects of the relationship attest to the couple's genuine intention to marry and live together as spouses.

34. Nature of the person's commitment to each other

35. The Tribunal was provided with documentation and received oral evidence detailing the inception and evolution of the relationship between the parties, their subsequent cultural

wedding ceremony, and the review applicant's several visits to the visa applicant in Vietnam up to and including in January-February 2018.

36. The review applicant claims that a cousin first gave her the visa applicant's telephone number during the course of a visit the review applicant paid to her father and other relatives in Vietnam in June-July 2013. Her cousin stated that she believed the persons would like other; however, the review applicant decided she was not ready to meet any "new friends" subsequent to her divorce from her first husband in March 2012, and that she did not keep the visa applicant's contact details at that time. On her return to Australia, the review applicant decided to contact her cousin and request the visa applicant's telephone number again. At this time, the parties first communicated via telephone and social media (predominantly Facebook). They subsequently met in person in November 2013 when the review applicant returned to Vietnam with her two children for an extended visit with her family of some three months. Over the course of this stay, the persons came to know each other and were physically intimate for the first time in early 2014.
37. The Tribunal received credible oral evidence from both parties detailing the development of their relationship over the course of 2014, during which year the review applicant visited Vietnam on two further occasions in April and June-July. The review applicant spoke of the visa applicant's proposal of marriage in July that year; her initial reservations about his proposal and her subsequent return to Australia; and her decision to return to Vietnam (again travelling with her children) in November 2014; and her ultimate acceptance of his proposal and their subsequent cultural wedding ceremony on 13 December 2014. The review applicant stated that she has returned to Vietnam frequently over the past three-and-a-half years to live with the visa applicant and regards them as husband and wife, notwithstanding that they have yet to complete a legal marriage contract under Vietnamese or Australian law. The review applicant also gave credible oral evidence regarding the emotional support the visa applicant has provided her over the course of their relationship, and how he has consistently impressed her with his maturity and willingness to work hard to support himself and his family.
38. On considering the evidence detailed above, the Tribunal accepts that the couple have been in a genuine and continuing relationship for more than four years; have lived together for almost a year over the course of several periods in Vietnam in that time; and have remained in regular communication during their periods of separation. The Tribunal also received oral evidence from the visa applicant attesting to the degree of companionship and emotional support the couple draw from each other.
39. The Tribunal is therefore satisfied as to the duration of the relationship and the length of time the persons have lived together (and not lived separately or apart) given the constraints of residing in separate countries. The Tribunal is also satisfied as to the degree of companionship and emotional support the couple draw from each other, and their shared view of the relationship as a long term one such as would demonstrate their genuine intention to live together and marry.
40. On the basis of the above, the Tribunal is satisfied that at the time of the visa application the parties genuinely intended to marry; that the marriage is intended to take place within the visa period; and that the parties genuinely intend to live together as spouses. Accordingly, the Tribunal is satisfied that cls.300.215 and 300.216 are met.

Do the parties continue to meet time of application requirements?

41. Clause 300.221 requires that at the time of decision, the visa applicant continues to satisfy the criteria in cls.300.211, 300.214, 300.215 and 300.216. That is, that the visa applicant intends to marry an Australian citizen, permanent resident or eligible New Zealand citizen;

that the parties have met and are known to each other personally; that the parties genuinely intend to marry and intend to do so during the visa period; and that the parties genuinely intend to live together as spouses. As detailed above, the Tribunal is satisfied that these criteria are met, and accordingly, cl.300.221 is met.

42. For the reasons above, the Tribunal finds the visa applicant satisfies the criteria for the grant of the visa.

Is there any impediment to the marriage?

43. Clause 300.221A requires that at the time of decision there is no impediment to the marriage in Australian law. As there is no impediment to the proposed marriage under Australian law, cl.300.221A is satisfied.

Conclusion

44. Given the findings above, the appropriate course is to remit the application for the visa to the Minister to consider the remaining criteria for a Subclass 300 visa.

DECISION

45. The Tribunal remits the application for a Prospective Marriage (Temporary) (Class TO) visa for reconsideration with the direction that the visa applicant meets the following criteria for a Subclass 300 (Prospective Marriage) visa:
- cls.300.215, 300.216 and 300.221 of Schedule 2 to the Regulations.

Shane Lucas
Member